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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/673,689
Filing Date: September 29, 2003
Appellant(s): ANDERSSON ET AL.

Celia H. Leber
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed on September 24th, 2008 appealing from the Office action mailed on March 13th, 2008.

(1) *Real Party in Interest*

A statement identifying the real party interest is contained in the brief.

(2) *Related Appeals and Interferences*

The brief contains a statement identifying that there are no prior or pending related appeals, judicial proceedings, or interferences.

(3) *Status of Claims*

The statement of the status of claims contained in the brief is correct.

(4) *Status of Amendments*

No amendment after final has been filed.

(5) *Summary of Claimed Subject Matter*

The summary of claimed subject matter contained in the brief is correct.

(6) *Grounds of Rejection to be Reviewed on Appeal*

The ground of rejection set forth in the appeal brief is correct.

(7) *Claims Appendix*

The appealed claims in the appendix of the brief are correct.

(8) Evidence Relied Upon

5,033,463 Cocozza 07-1991

(9) Grounds of Rejection

New ground of rejection applying the same reference.

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. Claims **34, 35, 37-39, 41 and 73** are rejected under 35 U.S.C. 103(a) as being unpatentable over Cocozza (US 5,033,463).

4. **As to claims 34, 35 and 73**, Cocozza substantially discloses an apparatus that comprises multi-dose inhaler for medicaments in powder that comprises a dosing unit **2** for providing a dose of powder (**see figure 10; column 8 lines 5-20**); and a flow path downstream of the dosing unit which is defined by a plurality of surfaces through which a stream of air entering the dose of

powder is in use drawn on inhalation by a user (**see column 10 lines 15-35**); characterized in that at least one of the surfaces of the flow path is movable relative to at least one other of the surfaces of the flow path and in that the inhaler further comprises a powder dislodging member which is of fixed position relative to one of the at least one or at least one other of the surfaces of the flow path and is configured on relative movement of the at least one and one other of the surfaces of the flow path (**the central part of the impeller in figure 1 is defined as the at least one of the surfaces of the flow path is movable relative to at least one other of the surfaces of the flow path**) but does not disclose contacting the other of the at least one or at least one other of the surfaces of the flow path such as to dislodge powder accumulated thereon, wherein the powder dislodging member comprises one of a scraper or a brush. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Coccozza's invention by providing an impeller that comes very close to touching if not touching the surface of the flow path in order to remove the accumulated medicament in the flow path.

5. **As to claim 37**, Coccozza substantially discloses an apparatus wherein the flow path includes a chamber which includes an inlet **178** and an outlet **172** (**see col. 10 lines 20-30**).
6. **As to claim 38**, Coccozza substantially discloses an apparatus wherein the at least one of the surfaces of the flow path defines at least part of the chamber (**see column 10 lines 20-40**).
7. **As to claim 39**, Coccozza substantially discloses an apparatus wherein the at least one and the at least one other of the surfaces of the flow path define at least in part opposed surfaces of the chamber and include the inlet and the outlet thereto (**see column 10 lines 20-30**).
8. **As to claim 41**, Coccozza substantially discloses an apparatus that further comprises a mouthpiece which includes one of the at least one or at least one other of the surfaces of the flow

path (see column 10 lines 5-30).

Allowable Subject Matter

9. Claims 55-64 are allowed. The prior art does not disclose a cap for covering at least the mouthpiece, which cap includes a screw thread for engaging the screw thread of the housing and a mouthpiece and a cap that are configured such that at least part of the mouthpiece is rotated relative to the housing on one of screwing or unscrewing the cap; characterized in that the at least part of the mouthpiece remains substantially in fixed position relative to the housing on the other of screwing or unscrewing the cap; characterized in that the at least part of the mouthpiece remains substantially in fixed position relative to the housing on the other of screwing or unscrewing the cap.

10. Claim 36 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. The prior art does not teach at least one of the surfaces of the flow path that is movable relative to at least one other of the surfaces of the flow path and the scraper is of fixed position relative to the at least one other of the surfaces of the flow path.

(10) Response to Arguments

The appellant argues that there is no indication that there is any structure described by Coccozza that is configured to contact a surface of the flow path such as to dislodge powder

accumulated thereon. The appellant further argues that the rotating impeller 50 shown in figure 1 of the Coccozza's reference clearly does not contact the wall of the flow path.

First the examiner would like to state that no where in the Coccozza's reference does it state that the drawings are to scale, therefore, the argument that the impeller 50 shown in figure 1 not contacting the wall of the flow path should not be considered. Second, it is the position of the examiner that it would be obvious to one skilled in the art to provide an impeller that is inches from touching if not touching the flow path so that the accumulated medicament is removed from the flow path, so that the accumulated medicament does not block the flow path.

The appellant further argues that the teaching of Coccozza to disintegrate agglomerates is not the same as dislodging medicament as required by the claims. However, Coccozza's reference clearly states that "In the channel 172 there is provided a device for disintegrating any particle agglomerates in the medicament to be inhaled (see col. 10 lines 5-15)." It is the position of the examiner that, to one skilled in the art, it is obvious that the phrase "any particle agglomerates" implies that the medicament accumulated on the surface of the flow path as well. By disintegrating any particle agglomerates, it is obvious that the device of Coccozza would also dislodge the accumulated medicament.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section (9) above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) **Reopen prosecution.** Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

Respectfully submitted,

/Nihir Patel/

Examiner, Art Unit 3772

December 5th, 2008

A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:

/DONALD HAJEC/

Director, Technology Center 3700

Conferees:

Patricia Bianco

/Patricia Bianco/

Supervisory Patent Examiner, Art Unit 3772

Angela Sykes

/Angela D Sykes/

Supervisory Patent Examiner, Art Unit 3762